

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Service Rules for the 698-746, 747-762)	WT Docket No. 06-150
and 777-792 MHz Bands)	
)	
Implementing a Nationwide, Broadband,)	PS Docket No. 06-229
Interoperable Public Safety Network in the)	
700 MHz Band)	

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the Report and Order and Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.¹ Advocacy commends the Commission for conducting both a final regulatory flexibility analysis (“FRFA”) for the Service Rules for the 698-746, 747-762 and 777-792 MHz Bands and an initial regulatory flexibility analysis (“IRFA”) on the proposed rule. Our comment letter is based on data received from small businesses facing regulatory burdens that may preclude their participation in the upcoming 700 MHz spectrum

¹ See *Report and Order and Notice of Proposed Rulemaking*, FCC Dkt. No. 07-72 (rel. April 27, 2007) [hereinafter, FNPRM].

auction.² In order to better understand the concerns of small businesses, Advocacy held a roundtable on April 10, 2007, and invited representatives from industry and the federal government to examine how changes to the FCC's auction rules have affected small business involvement in the auction process.³ Because the revisions made to the FCC's "designated entity" ("DE") rules have encumbered small business participation in auctions, we recommend that the FCC stay these rules for the 700 MHz auction and rely instead upon the original DE rules.⁴

Advocacy understands that the FCC is under a demanding timeline and commends the Commission for its work towards meeting Congress' statutory deadline for the auction's January 2009 start date. Ensuring that the auction begins on time is important, especially given the high value of the licenses that the FCC plans to offer. However, the Commission has declined to address many of the auction issues impacting small businesses and has not accepted public comment on these important concerns.⁵ Because of the key role that small businesses play in the auction process and the heightened importance of the 700 MHz auction, we believe that a further review of the DE rules under which small businesses may participate is warranted. Therefore, to assist the FCC in analyzing these issues,

² The Report and Order and Further Notice of Proposed Rulemaking combines WT Docket No. 06-150, CC Docket No. 94-102, WT Docket No. 01-309, WT Docket No. 03-264, WT Docket No. 06-169, PS Docket No. 06-229, and WT Docket No. 96-86. The Commission states that it is re-examining the rules "due to the significant changes that have occurred over the past several years in the statutory framework governing [the] spectrum." FNPRM, *supra* note 1 *at* 3.

³ Participants included members from the Rural Telecom Group, COMPTTEL, Wirefree Partners, Council Tree Communications, Frontline, CTIA, the FCC, the U.S. House of Representatives Small Business Committee, and local law firms.

⁴ Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 06-52.

⁵ *Id.*

Advocacy has solicited input from small entities, reviewed their recommendations, and prepared these comments regarding their concerns.

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.⁶ Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁷

On August 13, 2002, President George W. Bush signed Executive Order 13272 that highlights the President’s goal of giving small business owners a voice in the complex and confusing federal regulatory process by directing the Office of Advocacy to work closely with the agencies to ensure that the agencies can properly consider the impact of their regulations on small entities.

⁶ Pub. No. 96-354, 94 Stat. 1164 (1980).

⁷ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

2. The Current DE Rules Inhibit Economic Opportunities for Small Businesses, Rural Companies, and Minority Groups in the Use of Electromagnetic Spectrum.

Section 309(j) of the Communications Act was created in order to foster economic opportunities for small businesses, rural companies and minority groups in the use of the electromagnetic spectrum.⁸ To meet this goal, Congress mandated that the FCC establish auction rules that would allow small businesses to compete effectively for spectrum licenses and offer advanced technologies and services.⁹ Under this statutory duty, the Commission created a “designated entity (DE) program”¹⁰ where smaller companies may apply for “bidding credits” in order to compete effectively in spectrum auctions.¹¹ In April 2006, the FCC revised its DE rules to address concerns that larger companies would use “fronts” to facilitate sham DE bidding.¹² However, this revision may hinder small business participation in the 700 MHz auction, arguably the most important spectrum auction to date.¹³

⁸ The Communications Act lists as one of its objectives “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3).

⁹ 47 U.S.C. § 309(j)(4)(C).

¹⁰ The FCC’s DE Program has had various changes over the years, but the Commission currently interprets DEs to include small businesses and rural telephone companies. Under the DE Program, qualified businesses may receive bidding credits of 15 or 25 percent, depending on their size.

¹¹ See FCC Revises its “Designated Entity” Eligibility Rules in Advance of the Upcoming Advanced Wireless Services Auction, (April 2006) available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-265103A1.doc.

¹² See Filing by Media Access, Reform of Auction Rules for Upcoming AWS Auction, AU Docket No. 06-30, WB Docket No. 05-211, available at: <http://www.mediaaccess.org/press/SpectrumAuctionLetter.pdf>.

¹³ The spectrum available for auction is critical in expanding broadband service to rural and underserved communities. See, The High Tech DTV Coalition, Backgrounder: Rural Service Benefits of the 700 MHz Band, available at: http://www.itic.org/archives/rural%20benefits_backgrounder_3_.pdf.

While a number of different changes were made to the DE rules, two specific modifications inhibit small business access to capital. First, the Commission's restrictions on wholesale arrangements and leasing will limit the ability of DEs to structure their business models.¹⁴ The rules now prohibit DEs from entering into agreements with one or more entities "for the lease...or resale (including under a wholesale arrangement)" of fifty percent of their "spectrum capacity of any individual license."¹⁵ The rules further stipulate that a small entity that resells or leases more than 25 percent of the spectrum capacity for an individual license may also compromise that entity's eligibility for the DE Program.¹⁶ Small businesses fear that these rules will limit their ability to work with mobile virtual network operators ("MVNOs"), which operate based on a wholesale relationship.¹⁷ The severe restrictions on a DE's ability to participate in dynamic business partnerships such as this presents an insurmountable obstacle to many small entities interested in obtaining spectrum.¹⁸

Second, the Commission's extension of the time period for which DEs must

¹⁴ See, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 06-52.

¹⁵ *Id* at 11 (describing how the Commission considers these leasing agreements to be an "impermissible material relationship").

¹⁶ *Id.* Small companies have used leasing options in the past as a way to raise capital to expand their spectrum holdings and maintain a presence in the telecommunications market.

¹⁷ In a presentation by Council Tree Communications at Advocacy's Roundtable, Council Tree Communications outlined how the rules will block DE-MVNO partnerships. MVNOs do not own their own spectrum, but provide a valuable mobile service to customers, and are able to lease spectrum to conduct their business. Currently, the DE rules that prevent small companies from leasing spectrum will severely inhibit this type of business arrangement.

¹⁸ Staff Report, Market Update, MVNO 2006 Market Report, (November 2006) prepaid-press.COM, available at: http://www.prepaid-press.com/news_detail.php?t=paper&id=1528.

“hold” their spectrum places a significant burden on small companies.¹⁹ The rules irrationally inhibit small businesses from transferring their spectrum for at least ten years after the auction to a non-DE.²⁰ The Commission developed these rules to improve the probability that DEs will become competitive facilities-based service providers.²¹ The previous “Five-Year Hold Rule” accomplished the Commission’s goal in ensuring that DEs held their spectrum and utilized it, while still affording them some flexibility in the event that a change in their business plans was needed. This flexibility is critical to DE success in the market.²² As a result of the above-mentioned changes, the newer DE rules have exceeded their goal of protecting the program from abuse, and have severely burdened the small entities who wish to take part in the 700 MHz auction.²³

Given the importance of the 700 MHz auction, the inability of small entities to participate effectively in bidding for spectrum is likely to have a serious economic impact on the entire market.²⁴ Because the spectrum up for auction represents the

¹⁹ Brief for Petitioners In the United States Court of Appeals in the Third Circuit, Docket No. 06-2943, 7 (September 2006).

²⁰ Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 06-52. These rules were also retroactively applied to small businesses that had previously won spectrum from past auctions.

²¹ Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 06-52, 15.

²² *Id.*

²³ Testimony of Shelley Spencer, President of Wirefree Partners, LLC, Before the House Committee on Energy and Commerce Subcommittee on Telecommunications and the Internet, available at: http://energycommerce.house.gov/cmte_mtg/110-ti-hrg.041907.Spencer-testimony.pdf [hereinafter Spencer]. See also, Ex Parte Filing by Wirefree Partners III, L.L.C.—WT Docket Nos. 96-86, 06-150; PS Docket No. 06-229 700 MHz Auction Rules to Provide Fair and Equitable Opportunities for Small Business (discussing the need for regulatory flexibility in auction rules for small businesses) (April 2007).

²⁴ See, 700 MHz: A Pivotal Auction, New Blood for Broadband & Video or Telco/Cable Sweep, available at: http://www.wcai.com/pdf/2007/700_mar2.pdf (stating the importance of the 700 MHz Auction and the likelihood of incumbents making a clean sweep on available spectrum). See also, Comments by MetroPCS Communications, Inc. Re: WT Docket No. 06-150 (explaining the economic importance of new entry into the current telecommunications structure).

last “beach front property,” the lack of new entrants will block small business ownership of these licenses for the foreseeable future, solidifying the position of incumbents.²⁵ This result is not what Congress had hoped for in crafting Section 309(j).

3. Small Businesses Maintain an Important Role in FCC Auctions.

Small businesses have played a dynamic role in the U.S. telecommunications market since the passage of Section 309(j); however, their numbers are sharply declining.²⁶ The entrepreneurial presence of small businesses has spurred the development of new technologies such as voice-over Internet protocol, and it has led to the creation of new fiber networks.²⁷ Rules that burden small businesses and present barriers to their entry into the telecommunications market reduce the presence of this entrepreneurial activity and innovation.

The FCC’s latest revisions to the DE rules will prevent small entities, particularly businesses owned by women and minorities, from effectively competing in the upcoming 700 MHz auction.²⁸ Minority groups and women have been under-represented in the most recent FCC auctions, which is contrary to the goals of

²⁵ See, Comments by MetroPCS Communications, Inc. Re: WT Docket No. 06-150.

²⁶ Small business ISPs have declined to the point where they are almost completely phased out, and many small carriers have been forced to merge with one another in order to compete with the large incumbent. See, Grant Gross, *Small Telecom Carriers Focus on Providing Choices*, Infoworld.COM, available at: http://www.infoworld.com/article/05/03/07/HNcarrierschoice_1.html. See also, *Telecom’s Merger Fever*, Businessweek, available at: http://www.businessweek.com/investor/content/apr2006/pi20060407_259934.htm

²⁷ See, John Delaney, *Landmines for Landlines: The Growth of VoIP*, (July 2005) available at: http://www.forbes.com/2005/07/21/timewarner-mediacom-voip-cx_0721findsvpvoip.html (discussing the growth of these players in the market for phone services).

²⁸ See Spencer, *supra* note 19.

Section 309(j).²⁹ In past auctions, data shows that providing bidding-credits to women and minority-owned businesses actually raised revenue, and made the overall auction more competitive.³⁰

4. Small Businesses Participation in Auctions Has Been Declining Since the New Rules Were Instituted.

While the Commission has stated that the Advanced Wireless Services (“AWS”) auction (“Auction 66”) and other recent auctions provide small entities with “substantial opportunity to compete” for larger licenses,³¹ some of the data offered by small businesses does not support this point.³² Since Auction 66, DE participation in auctions appears to be decreasing.³³ According to a recent motion filed by Council Tree in its lawsuit against the Commission, only four out of eight DE applicants that filed the short form 175 application received approval to participate in Auction 69.³⁴ This decrease indicates that small businesses may no

²⁹ 47 U.S.C. § 309(j). See, Mosaic Partners, Diversity Coalition Initiative Presentation (February 21, 2007)(describing how minorities are dramatically under-represented among FCC licensees and how the FCC’s DE Program has essentially been eliminated under the 2006 rules). 47 U.S.C. § 309(j).

³⁰ See Peter Cramton, The Efficiency of the FCC Spectrum Auctions, *Journal of Law and Economics* (1998), available at: <http://www.journals.uchicago.edu/JLE/journal/issues/v41nS2/JLEv41p727/JLEv41p727.web.pdf> (stating that in the regional narrowband auction bidding credits given to minority groups increased revenue). See also, Ian Ayers & Peter Cramton, *Pursuing Deficit Reduction Through Diversity: A Case Study of How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 401 (1996).

³¹ FNPRM *supra* note 1, at 26.

³² See, Spencer, *supra* note 19 (explaining that small businesses won less than 4 percent of licenses based on economic value in Auction 66, in contrast to the 74 percent historical average value of licenses won by small businesses under previous FCC rules). See also, Ex Parte Comments of the Ad Hoc Public Interest Spectrum Coalition WT Docket 06-150 (explaining how based on the AWS auction, the DE rules need to be amended as the AWS auction “failed to achieve any of the public interest goals mandated by Congress”).

³³ Based on the results of Auction 69, where no small businesses won any licenses.

³⁴ Motion of Petitioners to Strike Respondents’ Defective Rule 28(j) Letter, page 3 (May 2007). See also,

longer have a “substantial opportunity to compete.”

5. The Current DE Rules Could Be Amended to Minimize Negative Impacts on Small Businesses in Time for the 700 MHz Auction.

Advocacy believes that as an alternative to the current process, the revival of the previous DE rules would strengthen DE participation in the 700 MHz auction.³⁵

Understanding that time is of the essence, and that the current rules unduly burden potential small business participants, Advocacy recommends that the FCC waive or stay the current DE rules to allow for full participation in the upcoming 700 MHz auction.

At a Roundtable hosted by Advocacy in the fall of 2006, small businesses explained that license sizes pose another significant barrier to their participation in the auction process.³⁶ Economic analysis has further shown that keeping smaller licenses in auctions encourages efficient aggregation and allow for “the continued participation of regional and local carriers.”³⁷ New entry to the U.S. telecommunications market is difficult at best, and Advocacy commends the Commission for its work to make smaller license sizes available. Advocacy recommends maintaining a mix of smaller geographic license sizes to assist in

FCC Public Notice, DA 07-123, “Auction of 1.4 GHz Band Licenses,” released January 23, 2007, available at: <http://wireless.fcc.gov/auctions/default.htm?job=release&id=4&y=2007>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Ex Parte Presentation by SpectrumCo LLC in WT Docket No. 06-150.

fostering a more robust participation by small businesses.³⁸ Advocacy further recommends that the commission foster the availability of the licenses to as many different participants as possible, rather than allotting spectrum to a single licensee.³⁹ Instead, allowing all participants to bid on this available spectrum would best foster new entry into the market.

6. Conclusion.

Advocacy urges the FCC to consider the comments from small businesses and to consider the regulatory impact of the current DE rules on the ability of small entities to participate in the upcoming 700 MHz Auction. Advocacy recommends that the Commission analyze the alternatives recommended above and other significant alternatives presented by commenters so that Congress' goals in enacting of 309(j) are realized.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or cheryl.johns@sba.gov.

Respectfully submitted,

³⁸ Advocacy has previously made this recommendation to the Commission. See, Comments by the Office of Advocacy, Re: Notice of Ex Parte Presentation in WT Docket No. 06-150, Service Rules for the 698-746, 747-762, and 777-792 MHz Bands (December 2006), available at: http://www.sba.gov/advo/laws/comments/fcc06_1207.pdf.

³⁹ FNPRM, *supra* note 1, at 97. The Frontline proposal requests designation as the nationwide operator of the public safety spectrum.

Office of Advocacy
Comment
U.S. Small Business Administration
07-72

FCC Dkt. No.

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Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this May 21, 2007, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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